

THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT

In re Petition of McCarthy

INS 13-038-AP

PETITIONER'S CLOSING ARGUMENT
AND MEMORANDUM OF LAW

Ms. Margaret McCarthy urges the Commissioner to require Anthem Blue Cross and Blue Shield ("Anthem") to submit all required information necessary to ascertain the adequacy of its New Hampshire Health Insurance Marketplace-available Pathway network (the "narrow network"), find that the narrow network is inadequate to serve the needs of the Strafford County population, and order Anthem to take all necessary steps to ensure that its narrow network meets the requirements of the Patient Protection and Affordable Care Act (the "ACA") and applicable New Hampshire law, including, without limitation, contracting with Frisbie Memorial Hospital and its affiliated medical providers. In support of her request for relief, Ms. McCarthy argues:

I. Facts

Margaret McCarthy has been insured by Anthem for her health insurance for many years. Transcript of May 14, 2014 hearing at 47-48 ("T. at ____"). For at least 15 years, she has seen Dr. Alexander Geller at Rochester Internal Medicine, an affiliated practice of Frisbie Memorial Hospital, as well as a gynecologist with the same affiliation. T. at 47, 50. Dr. Geller is familiar with Ms. McCarthy's health care needs and she feels "absolutely" comfortable with her ability to speak honestly with Dr. Geller about her healthcare. *Id.* She has always obtained her health insurance through a local agent. *Id.*

In September of 2013, Ms. McCarthy learned through the media that the new insurance plan offered by Anthem on the New Hampshire Health Insurance Marketplace (or "Exchange") would be a narrow network, which concerned her greatly because the narrow network did not include her physicians or their affiliated hospital, Frisbie. *Id.* at 48-49. She immediately called Anthem and tried to determine if the narrow network would apply to her policy. *Id.* at 49. Anthem told her by mid-September 2013 that the narrow network did not apply to her at that time. *Id.* at 50.

On October 9, 2013, Ms. McCarthy received a letter from Anthem stating that her existing policy would not be renewed and that future individual policies would only be available through the narrow network. *Id.* at 51, 53. Ms. McCarthy visited Anthem's website changemypolicy.com to investigate her options on the Exchange. *Id.* Exchange available plans were more expensive and did not include her current providers. *Id.* at 52. She also used a third party subsidy calculator to estimate the amount of money she would receive as a subsidy to enable her to purchase a policy on the Exchange - some \$3,000 based upon her 2012 income. *Id.* Ms. McCarthy's existing health insurance plan runs out in August 2014. She has the option of maintaining her current policy with Frisbie providers at substantially more expense; or she may select a lower cost plan on the Exchange that includes a subsidy but does not cover her existing physicians and providers. *Id.* at 55-56.

The Department considered one factor when evaluating the network adequacy of Anthem's narrow network: distance of insured members to health care providers. *See T.* at 230 ("So as far as time to access, you know, I guess, you know, we were not looking for that. We didn't feel, on a prospective basis, that [waiting time information] was

necessarily information of value.") (Michael Wilkey admitting that the Department did not consider waiting times); T. at 225-26 (admitting that travel time to providers was never considered because it "is not necessary."); T. at 176 (Alexander Feldvebel admitting that no consumer surveys regarding access to primary care providers were received or reviewed by the Department). In other words, Anthem did not even attempt to meet any of the other requirements for network adequacy set forth in the Department's regulations.

II. **Anthem's Pathway Network Is Not Adequate Because Anthem's Submissions In Support Of The Pathway Network Did Not Comply With The Department's Requirements Under Ins. 2701 et seq.**

It is an uncontestable matter of fact that Anthem's submission did not meet the requirements of N.H. Admin. R. Ins. 2701 *et seq.*, ("Ins. ____") for demonstrating network adequacy. Ins. 2701 requires that Anthem submit the following information and/or meet the following requirements for network adequacy:

- "Standard waiting times for appointments shall be measured from the initial request for an appointment and shall meet NCQA requirements." Ins. 2701.07(a).
- Access maps that show not only the location of providers, but also of insured members. Ins. 2701.09(g)(3).
- "In order to demonstrate primary care provider availability, a health carrier shall verify, by submission of a consumer survey broken down by county or hospital service area, that the primary care provider network is offering a level of service that meets the members' needs." Ins. 2701.06(b)(2).
- "The carrier shall prepare a network adequacy report and shall submit a health care certification of compliance report prior to offering a new health benefit plan." Ins. 2701.09(d).
- "There shall be at least 2 open panel primary care providers within 15 miles or 40 minutes average driving time of at least 90 percent of the enrolled population within each county or hospital service area." Ins. 2701.06(b)(1).

- "A health carrier's network of participating providers shall be considered sufficient to meet the basic access requirement in Ins 2701.04(a) if it meets *all* of the standards contained in Ins 2701.02 through 2701.09." Ins. 2701.04(b) (emphasis added).

Waiting Times

Regarding the fulfillment of these points, the Department admitted that Anthem did not submit, and the Department did not consider, waiting time information. T. at 230. Michael Wilkey, who oversaw the compliance process for network adequacy in this case, characterized data regarding waiting times as not being "necessarily information of value." The Department attempted to argue that because Anthem had received an accreditation of "Excellent" from the National Council on Quality Assurance, *see* Department's Exhibit G, it must have been compliant with Ins. 2701.07(a). But Anthem's certificate from the NCQA was not submitted by Anthem in connection with its network adequacy filings, and therefore could not have been expressly considered by the Department in evaluating network adequacy. *See* Petitioner's Exhibit 10 (Bates-stamped production of Department in response to RSA 91-A request for information relating to its evaluation of the network adequacy of Anthem's narrow network plan). Moreover, Department Exhibit G refers only to the fact that Anthem has a status "of Excellent for service and quality that meet or exceed NCQA's rigorous requirements for consumer protection and quality improvement." Nowhere does Exhibit G talk about waiting times, or define what "rigorous requirements for consumer protection and quality improvement" or the acronyms stated on Exhibit G include. T. at 148-49 (Feldvebel: "I don't know what the acronym [HEDIS] stands for[.]").

In fact, Exhibit G is a certificate granted by the NCQA on March 21, 2012 for a health plan ("HOS/POS Combined") that, most importantly, was not a narrow network.

Whether Anthem's health plans prior to the ACA met waiting time standards under New Hampshire law is not at issue in this case; whether they can meet those standards with two thirds the hospitals and radically fewer providers is the question, and Exhibit G has no relevance to that analysis. Exhibit G is no substitute for the Department requiring that Anthem submit actual data concerning waiting times for its narrow network in compliance with Ins. 2701.07(a). There is no dispute that Anthem did not. The Department failed to require Anthem's compliance with Ins. 2701.07(a).

Anthem's and the Department's argument that no waiting time data existed because there were no members of the narrow network plan in the summer of 2013 is a diversion. Anthem was required by law to have such data for Strafford County for its existing HMO plans. Ins. 2701.07(a). At a minimum, the Department could have- and should have- required Anthem to submit its existing data to conduct an analysis of how removing Frisbie Memorial Hospital-affiliated providers in northern Strafford County would affect those waiting times.¹

Access Maps

Although Anthem submitted access maps with providers identified, it failed to provide information about members and where they would be located. *See, e.g.,* Department's Exhibit A; Petitioner's Exhibit 3. Consequently, Anthem is non-compliant with Ins. 2701.09(g)(3), which requires that Anthem's maps depict the location of both

¹ When counsel for Ms. McCarthy attempted to cross examine Department witnesses on this point, the Department objected to such testimony as unfounded, while simultaneously arguing that Ms. McCarthy needed to develop this theory through evidence if she was going to argue it. T. at 232. Contrary to the Department's opinion, it does not take an expert to look at waiting time data for providers in a given area and derive some reasonable indication about what the effect of removing a large percentage of providers from the network would be- especially if the number of insured accessing those providers was going to increase by specific design. *See* T. at 111-12. But even if it did, the failure of Anthem- and the Department- was in not filing adequate, verifiable information in order to make determinations about network adequacy. Ins. 2701's reporting and data requirements exist for a reason. Only with accurate and complete data can any analysis of network adequacy be made.

providers *and* members. This is of critical importance in this case because the location of members of the Anthem Exchange-available Pathway network is determinative of whether or not Anthem has demonstrated compliance with Ins. 2701.06(b)(1)- the sole metric by which the Department apparently evaluated Anthem's submissions.

Anthem and the Department will argue that Anthem had no members at the time it submitted its proposed narrow network for scrutiny by the Department and therefore could not provide the necessary information. As a proxy for the members of its narrow network, Anthem relied upon the location data for members of its then-existing array of plans for the purposes of determining whether its proposed narrow network would be adequate. T. at 158-59, 228-29. In other words, the locations of providers in the narrow network were compared to the addresses of individuals in Anthem's other plans to determine whether these provider locations provided access to two open panel providers within 15 miles of 90% of the 19,034 Anthem insured members as of the summer of 2013. T. at 225.

The problems with this analysis are multifold. First, the GeoAccess reports that purported to affirm compliance with the 15-mile requirement of Ins. 2701.06(b)(1) did not show where the members were, as required by Ins. 2701.09(g)(3). The graphic representation of the location of the members is important for showing the public where populations are concentrated. It is unlikely that Anthem's 19,034 population of existing members as of 2013 is an accurate proxy for potential new members for the simple reason that the ACA was intended to insure the previously uninsured. T. at 167. By definition, the population that would rely upon the Pathway narrow network would be a demographically different population- one less likely to have been insured, more likely to

be poor, unemployed and undereducated. Petitioner's Exhibit 12 at 39 ("[A]dults with **less education, lower incomes**, and younger age were most likely to lack health insurance.")(emphasis added).

In Strafford County, the towns in the northern part of the county are substantially more likely to have lower incomes and higher educational attainment:

Municipality (Southern)	Income (family/4)	2012 Pop.	4 Years College
Barrington	\$87,252	8,705	35.8%
Dover	\$72,797	30,313	37.1%
Durham	\$114,191	15,153	72.8%
Lee	*n/a	4,366	*n/a
Madbury	\$98,594	1,786	51.4%
Rollinsford	\$80,809	2,523	34.9%
Somersworth	\$69,578	11,765	23.7%
Totals/Average	\$87,204	74,611	40.2%
Municipality (Northern)	Income (family/4)	Population	4 Years College
Farmington	\$63,326	6,834	13.2%
Middleton	\$61,111	1,782	11%
Milton	\$58,880	4,594	12.7%
New Durham	\$83,409	2,628	29%
Rochester	\$62,044	29,763	19.4%
Strafford	\$82,679	4,007	39.4%
Totals/Average	\$68,574.83	49,608	19.7%

Petitioner's Exhibits 8 and 9.² Based upon the demographics of the towns of Strafford County and the reasonable assumptions that can be drawn about insurance coverage, populations in the northern part of Strafford County are far more likely to be signing up for coverage through the Exchange. *Id.* Moreover, the wealth and educational attainment figures suggest that Anthem's existing member pool, as of the summer of 2013, was more likely to be in the southern part of Strafford County. *Id.*

As the Department's Exhibit H lucidly depicted, there is not a single primary care provider in Anthem's narrow network in the towns of Farmington, Middleton, Milton, New Durham, Rollinsford or Strafford. There are three primary care providers in Rochester.³ This spread of providers is woefully inadequate given that the location where the majority of the actual members of the narrow network will be living is, more likely than not, the northern part of Strafford County.⁴ At a minimum, to advance the overarching goals of the ACA, *see* T. at 167-68, Anthem should have been required to submit data concerning the locations of its 2013 member pool and any data it had compiled regarding the likely location of its target population for the narrow network. There were ways for the Department to compel Anthem to adhere to the letter and the spirit of Ins. 2701.09(g)(3), and advance the broad goals of insuring the uninsured and ensuring they have practical access to health providers. None were attempted.

² Note that Exhibit 9 inadvertently omitted the Town of Lee, therefore average income for the towns of northern Strafford was calculated based upon five towns, not six, and percentage of 4 year college degree holders was calculated on a county-wide percentage basis, deducting the population figure for Lee from the total to render an accurate county-wide average. Had the Lee figures for income for a family of four (\$98,387) and educational attainment (48.6%) been included the average income and educational attainment figures for southern Strafford County would have been substantially higher.

³ Of these, one, Walter Hoerman, MD, is a pediatrician, not serving adults; one is James Bress, MD, who is listed on Anthem's provider list, Petitioner's Exhibit 7, as both accepting and not accepting patients; and the last is Terry Bennett, MD.

⁴ Frisbie Memorial Hospital serves these poorer, less educated populations, with facilities in Farmington, Rochester and Wakefield. Petitioner's Exhibit 13. The inclusion of Frisbie would remedy the gap in coverage in the poorest part of the county.

Consumer Survey

Ins. 2701.06(b)(2) required Anthem to submit a consumer survey "broken down by county or hospital service area, [showing] that the primary care provider network is offering a level of service that meets the members' needs." Anthem submitted no such survey. T. at 176. Anthem and the Department will likely argue, again, that no data existed for members of its narrow network because none existed at the time Anthem filed its submissions in 2013. However, Anthem was required to conduct such surveys annually for its policies and plans and should have had the results of such a survey available for Strafford County. Ins. 2701.06(b)(2). The fact that the Department did not require the submission of a survey for review under these circumstances is mystifying, and in direct contravention of Ins. 2701.06(b)(2).

Geographic Distance and Drive Times

The Department admitted that no analysis was made or considered of drive times in evaluating access to two open panel providers by 90% of the population. T. at 225-26; *see* Ins. 2701.06(b)(1). Thus the only analysis conducted by the Department, in contradiction to the host of standards set forth in Ins. 2701 et seq., was that of mileage. For the reasons stated above, Anthem's figures for access do not reflect the reality that the population obtaining insurance through the Exchange on the narrow network is more likely to live in northern Strafford County. But even assuming that the then-existing pool of 19,034 members of Anthem plans is an accurate proxy for the whole county, the suggestion that 100% of the member population would be within fifteen miles of two primary care providers accepting patients cannot be correct. The population of New Durham, Milton, Middleton and Farmington was 15,838, or 12.7% of the Strafford

County population. New Durham, Milton and Middleton, with approximately 9,000 in population, are each 15 miles or more from the location of the two nearest adult primary care providers listed on the Department's Exhibit H (Bress and Bennett). Large parts of Farmington and Strafford are outside that 15 mile envelope. Thus, it is likely- although unverifiable given that Anthem failed to produce individual member location data- that even if its narrow network members were distributed proportionately throughout each town in the County, at least ten percent of them would not be within the 15 mile standard. When one accounts for the disproportionate representation of likely members of the narrow network in these poorer northern towns, the percentage without the required access would only increase.

Anthem will argue that there was no data from which the above analysis could be substantiated. That is exactly the point. A substantial portion of Ins. 2701 is dedicated to ensuring that the Department and the public have access to the data that Anthem relied upon to found its assertions of network adequacy. Ins. 2701.09. These requirements were never fulfilled- and had they been, they likely would have shown Anthem's narrow network to be inadequate in Strafford County.

Conclusion

Ins. 2701.04(b) states: "A health carrier's network of participating providers shall be considered sufficient to meet the basic access requirement in Ins 2701.04(a) if it meets *all* of the standards contained in Ins 2701.02 through 2701.09." *Id.* (emphasis added). In Strafford County, it is questionable whether Anthem's narrow network met any of the standards for adequacy set forth in Ins. 2701.02 through 2701.09. But at a minimum, "all of the standards" were not met, and no attempt was made to meet them or address the

concerns they embodied. The Department erred in approving the network adequacy of Anthem's narrow network because Anthem failed to submit all the necessary information required to certify the network. But more importantly, the network is substantively inadequate. The narrow network forces its members, who are more likely to live in the poorest parts of Strafford County, to travel more than the permissible distance to access their healthcare. This was not the intent of the ACA. The Department is allowing Anthem, the sole carrier on the Exchange, to reduce its costs by making it as hard as possible for its insured members to access the care they are entitled to receive. The Department should rectify this unconscionable result with an order that Anthem include additional providers in northern Strafford County, including Frisbie Memorial Hospital and its affiliated providers.

III. **The Department's and Anthem's Arguments That Anthem Was Not Required To Fully Comply With Ins. 2701 *et seq.* Are At Odds With The Department's Instructions To Insurers, The Goals And Objectives Of The ACA, And The Department's Mandate Under New Hampshire Law.**

It became clear in the course of the May 14, 2014 hearing that the Department and Anthem were prepared to argue that Ins. 2701 was merely discretionary in nature. E.g., T. at 125-26 (Mr. Feldvebel testifying that Ins. 2701 only applies to networks in counties where there were more than 1,000 members, so if taken literally, Anthem's narrow network would not have had to conform to any network adequacy requirements at the time it was submitted for approval). Mr. Feldvebel further suggested that the Ins. 2701 standards conflicted with federal law, and that the Department has discretion to apply them reasonably under the circumstances. T. at 173.

These arguments are incorrect for two reasons. First, when the Department issued its instructions to insurers about compliance with regulations there was never any

indication that the standards of Ins. 2701 would be discretionarily applied. Petitioner's Exhibit 1; Department Exhibit F at 228 ("Issuers of medical QHPs *must comply* with New Hampshire Code of Administrative Rules Part Ins 2701 (Network Adequacy).") (emphasis added). The Department's and Anthem's positions are nothing more than a post-hoc justification for the failure to ensure that Anthem's plans fulfilled all the requirements of Ins. 2701 in letter and spirit.

Second, and more importantly, Mr. Feldvebel's and Michael Wilkey's suggestions that the Department, in agreeing to ignore certain aspects of Ins. 2701, was merely exercising its authority to apply those aspects of its regulations that were not "contrary or in violation of the guidances given [the Department] by the Affordable Care Act," betray the very purpose of the ACA: to extend healthcare to those who could not access it previously for lack of insurance. T. at 230; T. at 167-68. If anything, the ACA would favor the rigorous application of network adequacy standards and disfavor the kind of "discretionary" omissions that occurred in this case. There is nothing about waiting time standards, the requirement for consumer surveys, or drive time requirements that is in conflict with the ACA. In fact, as the Department explained lucidly in its direct testimony, T. at 123-24, the ACA provides a very broad network adequacy requirement that the N.H. Legislature expected the Department to flesh out with existing New Hampshire standards. *See* RSA 420-N:8, I (vesting oversight of network adequacy in the Department). For that reason, it is absurd to suggest that the requirements which the Department elected not to enforce in this instance are in any way antithetical to the ACA.

IV. Conclusion

Under Ins. 2701 et seq., Anthem must show that it meets the Department's network adequacy requirements. That burden is not the Department's; nor is it Ms. McCarthy's. Anthem's filings were inadequate to survive scrutiny under Ins. 2701. Anthem never submitted waiting time data, driving time data, consumer survey data, or accurate maps and distance data for its projected members in northern Strafford County. These failures are both substantive and administrative. It is not enough to say that the omissions were merely technical- the network adequacy reporting requirements exist specifically to give the Department and the public the ability to verify Anthem's submissions and certifications of network adequacy against actual data to ensure that its networks are, in fact, adequate. Without adequate data, reports and information, there is no adequate network. The failure to require Anthem to complete its submission requirements has obscured what are almost certainly substantive gaps in its network in northern Strafford County. These gaps can only realistically be addressed by requiring Anthem to add Frisbie Memorial Hospital and its affiliated physicians to Anthem's network of providers in Strafford County. *See* Ins. 2701.10 (conferring substantial authority on the Department to order corrective action when it finds a network inadequacy). This is not only the correct decision according to the Department's regulations; it is the result called for by the goals of the ACA. The conspicuous omission of providers from any of the northern Strafford County towns where the populations are poorer, less well educated, and more likely to be signing up for insurance on the Exchange is absolutely alien to the purpose of the ACA. Including Frisbie Memorial

Hospital and its providers in Anthem's network would resolve Ms. McCarthy's injury, to be sure, but it would also rectify the ill effects of a "business decision," T. at 109, that has left hundreds, if not thousands of Strafford County residents with difficult access to healthcare.

Ms. McCarthy therefore requests that the Commissioner enter her proposed findings of fact and rulings of law.

Respectfully submitted,

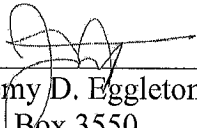
Margaret C. McCarthy

By her attorneys,

Orr & Reno, P.A.

Date: June 4, 2014

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Certification

I, Jeremy D. Eggleton, certify that on this the 4th day of June, 2014, I caused a copy of the foregoing Closing Argument and Memorandum of Law to be served via electronic mail and US mail upon Richard McCaffrey, Esq., New Hampshire Department of Insurance, and Michael Durham, Esq., counsel for Anthem Blue Cross Blue Shield.



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